U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 07 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is September 17, 2001. The beneficiary's salary as stated on the labor certification is $9.80 per hour or $20,834 per year.

The director observed that the petitioner had submitted no evidence of the petitioner's ability to pay the proffered wage. Moreover, the director determined that Form ETA-750 did not require two (2) years of training or experience, as required by the Act. [1] The director concluded that the petitioner could not qualify the beneficiary as a skilled worker under this Form ETA 750 and denied the petition.

The petitioner filed this appeal and is self-represented. [2] The petitioner states, as the reason for this appeal:

> To clarify a mistake on Part 2 of the I-140 form. This should have been checked G instead of E, also to secure and include with this appeal my 2002 tax records, and others.

Box E relates to skilled labor, as set forth in the Act, *supra*. Box G references other, unskilled workers and corresponds to § 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii). The petitioner proposes to amend the Immigrant Petition for Alien Worker (I-140) for the lesser classification after the director has entered the decision

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[1] The ETA 750, indeed, specified zero (0) education, training, "on the job" training, or experience for this position.

[2] The petitioner has executed no Notice of Entry of Appearance of Attorney or Representative (G-28). The AAO will weigh all material evidence, whether transmitted by the petitioner or Immigration Consultant Group (ICG). Having filed no G-28, ICG cannot properly file an appeal or claim notice. *See* 8 C.F.R. §103.3(a)(2)(v)(A)*(2)*.

of Citizenship and Immigration Services (CIS), formerly the Service or INS. [3] No law or regulation requires the director to consider lesser classifications if the petitioner does not establish the beneficiary's eligibility under the one requested. The AAO cannot conclude that the director committed reversible error by adjudicating the petitioner under the classification that the petitioner requested. No provision permits the petitioner to amend the petition on appeal in order to establish eligibility under a lesser classification.

Though the circumstances differ in various authorities, the pertinent reasoning is persuasive. The petitioner must establish that the position offered to the beneficiary merited the stated classification. *See Matter of Michelin Tire Corp*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petitioner may not make material changes in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec.169, 176 (Assoc. Comm. 1988).

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner has not established the eligibility of the beneficiary for the position offered and has not overcome this portion of the director's decision. Therefore, the issue, as to the petitioner's ability to pay the proffered wage, is moot. Evidence pertaining to it is not material.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[3] The other worker provision provides visas for other qualified immigrants, who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.